

INTERNATIONAL COURT OF JUSTICE

Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self Government of Kosovo (Advisory Opinion)

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December 8, 2009

1. Mr. President, Honorable members of the Court:

It is a great honor to appear before you today on behalf of the United States of America, a nation born of a declaration of independence more than two centuries ago, to urge this Court to leave undisturbed the declaration of independence of the people of Kosovo.

2. The United States appears today as a friend of both Serbia and Kosovo. The people of the United States share a bond of friendship with the people of Serbia marked by cooperation in two world wars and longstanding political and economic ties that date back at least to the bilateral Treaty of Commerce of 1881. Our relationship with the people of Kosovo, strengthened through crisis these last two decades, continues to grow. That said, our sole task today is to address the narrow legal question before this Court.

3. Over the past week, those pleading before you have discussed a broad range of issues, including the validity of recognitions of Kosovo, the effectiveness of the United Nations, the legality of military actions in 1999, and the potential responsibility of non-state actors for internationally wrongful acts. Yet the precise question put to this Court is much narrower: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?” The answer to that question, we submit, is yes. For as a general matter, international law does not regulate declarations of independence,

nor is there anything about Kosovo's particular declaration that would render it not "in accordance with international law."¹ Standing alone, a declaration neither constitutes nor establishes political independence; it announces a political reality or aspiration that must then be achieved by other means. Declaring independence is fundamentally an act of popular will—a political act, made by a body politic, which other states then decide whether to recognize or not.²

4. To say that international law does not generally authorize or prohibit declarations of independence signals no lack of respect either for international law or the work of this Court. Rather, such a statement merely recognizes that international law does not regulate every human event, and that an important measure of human liberty is the freedom of a people to conduct their own affairs. In many cases, including Kosovo's, the terms of a declaration of independence can mark a new nation's fundamental respect for international law. As our own Declaration put it, a "decent respect to the Opinions of Mankind" dictates "that facts be submitted to a candid world." Of the more than 100 declarations of independence issued by more than half of the countries in the world,³ we know of none that has been held by an international court to violate international law. We submit that this Court should not choose Kosovo's declaration of independence as the first case for such unprecedented judicial treatment. Few declarations can match the political legitimacy of Kosovo's peaceful declaration, which issued from a body representing the will of the people, was born of a successful, decade-long UN effort to bring peace and security to the Balkans region, and reflected the capacity of the people of Kosovo to govern themselves. As the principal judicial organ of the United Nations, this Court should decline the invitation to undo

¹ Written Statement of the United States of America ("U.S. Statement"), pp. 50-55.

² *Id.* pp. 51-52.

³ David Armitage, *The Declaration of Independence: A Global History* 3, 20 (2007).

the hard work of so many other parts of the UN system, potentially destabilizing the situation and unraveling the gains so painstakingly achieved under Resolution 1244.⁴

5. Mr. President: A careful consideration of the pleadings before this Court compels three conclusions, which will structure the rest of my presentation:

First, Kosovo's declaration of independence brought a necessary and stabilizing end to a turbulent chapter in the history of the Western Balkans, and made possible a transition to a common European future for the people of Kosovo and their neighbors. The real question this Court faces is whether to support re-opening of this tragic past or whether instead to let Kosovo and Serbia look forward to this more promising future.

Second, as a legal matter, there is no inconsistency between Kosovo's peaceful declaration of independence and principles of international law, including Security Council Resolution 1244. Like others attending these proceedings who participated in these historic events, I attended the Rambouillet negotiations as U.S. Assistant Secretary of State for Democracy, Human Rights and Labor, and observed the great pains taken to respect international law and to preserve human rights throughout the lengthy diplomatic negotiations that led to Resolution 1244, and ultimately to Kosovo's Declaration. We respectfully submit that a Security Council resolution drafted with such an intent did not give birth to a declaration of independence that violates international law.

Third, and finally, we question whether this case—which involves an unprecedented referral of a narrow, anomalous question—marks an appropriate occasion for this Court to exercise its advisory jurisdiction. But should the Court decide that it must render an advisory opinion, the Court would best be served by answering that

⁴ See Written Comments of the United States of America ("U.S. Comments"), pp. 3-4.

narrow question in the affirmative: that Kosovo's declaration of independence is in accordance with international law.

I. Kosovo's Declaration of Independence

6. Mr. President, you have now heard many times the story of Kosovo's declaration of independence and the trauma from which it was born. That declaration was the product of not one, but three overlapping historical processes, which did not preordain Kosovo's declaration, but do help to explain it—the disintegration of Yugoslavia; the human rights crisis within Kosovo; and the United Nations' response.

7. First, from the *Bosnia* case, this Court knows well the painful story of the **Yugoslav process**: the rise of Serb nationalism in the 1980s, followed by the breakup first of the Socialist Federal Republic of Yugoslavia (S.F.R.Y.) in 1991-92, then of the Federal Republic of Yugoslavia (F.R.Y.) more than a decade later. You know of the successive independence of Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, Montenegro and finally, of Kosovo.⁵

8. Second, you have heard about **Kosovo's internal process**: the grim, well-chronicled background of atrocities and ethnic cleansing; how the people of Kosovo suffered years of exclusion from public facilities and offices; how some 10,000 people were killed in state-sponsored violence, how one million people were driven from the territory, and how the people of Kosovo developed self-government over nearly ten years of separation from Belgrade. You know of the drastic escalation of oppression by Belgrade in the late 1990s; of the atrocities that were recorded by the United Nations and human rights organizations; of the unsuccessful attempt to achieve a solution acceptable to both Serbia and Kosovo at Rambouillet; of the brutal

⁵ See U.S. Statement, pp. 8-9, 77-78.

campaign of ethnic cleansing launched by Belgrade against ethnic Albanians in the spring of 1999; and of the eventual adoption of Security Council Resolution 1244 in June 1999.⁶

9. Third, the declaration at issue did not happen spontaneously; it emerged only after an extended **United Nations process**, in which a United Nations administration focused on developing Kosovo’s self-governing institutions, and a sustained UN mediation effort exhausted all available avenues for a mutually agreed solution, before finally concluding—in Martti Ahtisaari’s words—that “the only viable option for Kosovo is *independence*.”⁷

10. By adopting Resolution 1244, the Security Council sought to create a framework to promote two goals. The first was to protect the people of Kosovo, by building an *interim* environment where they would be protected by an international *security* presence—the NATO-led KFOR—and where they could develop political institutions free from Belgrade’s coercion under an international *civil* presence in the form of UNMIK.⁸ Second, the Resolution authorized the international civil presence to facilitate a political process designed to determine Kosovo’s future status, but only at a later stage.⁹

11. This UN umbrella and game plan provided critical breathing space for Kosovo to stabilize and develop effective Provisional Institutions of Self-Government (PISG): an elected assembly, a president, a prime minister, ministries and a judiciary.¹⁰ UNMIK steadily devolved authority to those Kosovo institutions, allowing the people of Kosovo to rule themselves free

⁶ See *ibid.*, pp. 8-22.

⁷ Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status, S/2007/168, 26 March 2007, para. 5 (emphasis added) [Dossier No. 203]; see also U.S. Statement, pp. 22-32.

⁸ See U.S. Statement, pp. 19-20.

⁹ See *ibid.*, pp. 20-21.

¹⁰ See *ibid.*, p. 23.

from Belgrade's influence.¹¹ In 2005, the Secretary-General's Special Envoy Kai Eide found the status quo unsustainable, which led the UN Security Council to launch a political process, led by Special Envoy Martti Ahtisaari, to determine Kosovo's future status.¹² But after many months of intensive negotiations involving all interested parties, Special Envoy Ahtisaari concluded in March 2007: (1) that even with autonomy, Kosovo's reintegration with Serbia was "simply not tenable"; (2) that continuing interim administration without resolving Kosovo's future status risked instability; and (3) that further efforts to find common ground between Kosovo and Serbia were futile.¹³ In Mr. Ahtisaari's words, "the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted," and "[n]o amount of additional talks, whatever the format, will overcome this impasse."¹⁴ Going forward, the Envoy concluded, "the only viable option for Kosovo is *independence*, to be supervised for an initial period by the international community."¹⁵

12. While some in these proceedings have questioned the integrity and impartiality of the Special Envoy, a most distinguished Nobel Laureate, the Secretary-General confirmed his full support for the Special Envoy's recommendation, having himself "taken into account the developments in the process designed to determine Kosovo's future status."¹⁶ The entire Contact

¹¹ See *ibid.*, p. 24.

¹² See *ibid.*, pp. 25-26.

¹³ See Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, S/2007/168, 26 March 2007, paras. 3-9, 16 [Dossier No. 203].

¹⁴ *Ibid.*, paras. 3, 5.

¹⁵ *Ibid.*, para. 3 (emphasis added).

¹⁶ See Letter dated 26 March 2007 from the Secretary-General to the President of the Security Council, attaching Report of the Special Envoy of the Secretary-General on Kosovo's Future State, S/2007/168, 26 March 2007 [Dossier No. 203]; see also U.S. Statement, p. 30.

Group “endorsed fully the United Nations Secretary-General’s assessment that the status quo is not sustainable.”¹⁷ And the Council of the European Union—including even those members who would later decline to recognize Kosovo’s independence—expressed its “full support” for the Special Envoy and “his efforts in conducting the political process to determine Kosovo’s future status.”¹⁸

13. Nevertheless, a “Troika” of senior negotiators was charged to make a last-ditch effort to find a negotiated solution.¹⁹ According to its report, the Troika “left no stone unturned in trying to achieve a negotiated settlement of the Kosovo status question.”²⁰ But when those Troika talks also reached an impasse, Kosovo’s elected leaders consulted widely and on February 17, 2008, issued their declaration pronouncing Kosovo “an independent and sovereign state.”²¹

14. Like many declarations of independence, Kosovo’s declaration was a general manifesto, published to all the world, that affirmed the new state’s commitments as a member of the international community. The declaration accepted the obligations in the Ahtisaari Plan, and announced Kosovo’s desire for friendship and cooperation with Serbia and all states.²²

¹⁷ Letter dated 10 December 2007 from the Secretary-General to the President of the Security Council, S/2007/723, 10 December 2007, Annex 3 (Statement on Kosovo by Contact Group Ministers, New York, 27 September 2007) [Dossier No. 209].

¹⁸ Council of the European Union, 2756th External Relations Council Meeting of 16-17 October 2006, para. 6, *available at* <http://www.westernbalkans.info/upload/docs/91337.pdf>.

¹⁹ *See* U.S. Statement, p. 31.

²⁰ Statement of the Federal Republic of Germany, Annex 5 (Letter of 5 December 2007 from German Ambassador Wolfgang Ischinger to European Union High Representative Javier Solana).

²¹ *See* U.S. Statement, pp. 32-33.

²² *See* Declaration of Independence [Docket No. 192]; U.S. Statement, pp. 33, 56-57.

15. Today, nearly two years later, we see that the declaration of independence was the ultimate product of all three processes I have described: it brought closure to Yugoslavia's disintegration; it enshrined human rights protections for all communities within Kosovo; and it broke the impasse in the United Nations process. Yesterday, counsel for Cyprus colorfully but inaptly suggested that the United Nations Security Council was involved in the "amputation" of Kosovo and the "dismemberment" of Serbia. But Cyprus never mentioned that Kosovo became independent not because of unilateral, brutal U.N. action, but through the interaction between a U.N. process that helped end brutality, and the parallel processes of Yugoslavia's disintegration and increasing Kosovo self-governance.

16. The simple fact is that Resolution 1244 worked. Without preordaining, it permitted Kosovo's independence. Kosovo is now both independent and functioning effectively. Kosovo has been recognized by 63 nations, and all but one of its immediate neighbors, including former Yugoslav Republics Slovenia, Croatia, Macedonia, and Montenegro. No fewer than 115 of the world's countries have treated Kosovo as a state, by either formally recognizing it or voting for its admission to international financial institutions. And the 2008 declaration of independence has opened the way for a new European future for the people both of Kosovo and the wider Balkans region.

II. Legal Arguments

17. Mr. President, against this reality, Serbia now seeks an opinion by this Court that would turn back time, although doing so would undermine the progress and stability that Kosovo's declaration has brought to the region. As a legal matter, this Court should find that Serbia's desired outcome is dictated neither by general principles of international law, nor by Security Council Resolution 1244.

A. General International Law

18. As we detailed in our written pleadings, Kosovo's declaration of independence declared a political aspiration, which cannot by itself violate international law. General international law does not as a general matter prohibit or authorize declarations of independence.²³ Other nations accept or reject the legitimacy of a declaration of independence by their willingness or refusal to treat the entity as a state: that test only confirms the legitimacy of Kosovo's declaration here. But without citing any authority, Serbia asks the Court to adopt the opposite, sweeping rule: when territory has not been illegally annexed, Serbia claims, the international law principle of territorial integrity prohibits *all* nonconsensual secessions (and *a fortiori*, all declarations of independence), except where domestic law grants a right of secession or the parent state accepts the declaration before or soon after the secession.²⁴ Yet as our written filings establish, no such general international law rule bars declarations of independence, nor can there be such *ad hoc* exceptions to a general rule that does not exist.²⁵

²³ See Malcolm Shaw, "Re: Order in Council P.C. 1996-1497 of 30 September 1996," in *Self-Determination in International Law: Quebec and Lessons Learned*, p. 136 (Anne Bayefsky, ed. 2000) ("It is true that the international community is very cautious about secessionist attempts, especially when the situation is such that threats to international peace and security are manifest. Nevertheless, as a matter of law the international system neither authorises nor condemns such attempts, but rather stands neutral. Secession, as such, therefore, is not contrary to international law."); John Dugard & David Raič, "The Role of Recognition in the Law and Practice of Secession," in *Secession: International Law Perspectives*, p. 102 (Marcelo Kohen, ed. 2006) ("One will search in vain for an explicit prohibition of unilateral secession in international instruments. The same is true for the explicit recognition of such a right."); Daniel Thürer, "Secession", in *Max Planck Encyclopedia of Public International Law* (Rüdiger Wolfrum, ed.) available at <http://www.mpepil.com>, p. 2 ("International law, thus, does not state conditions of legality of a secession, and neither does it provide for a general 'right of secession'. It does not in general condemn movements aiming at the acquisition of independence, either."); see generally U.S. Statement, pp. 50-55; U.S. Comments, pp. 13-14.

²⁴ Written Statement of the Government of the Republic of Serbia ("Serbia Statement"), para. 943.

²⁵ See U.S. Written Comments, pp. 13-20; see also U.S. Written Statement, pp. 50-55.

19. To see that international law does not prohibit declarations of independence simply because they were issued without the parent state's consent, one need look no further than Yugoslavia itself, where the Slovenian and Croatian declarations of independence initiated Yugoslavia's breakup in 1991. When those declarations issued, Belgrade also declared, wrongly, that both declarations violated both Yugoslav and international law. But today, even Belgrade no longer makes those claims. To the contrary, Serbia now asserts that Slovenia's and Croatia's secessions were lawful under international law *because* they were permitted under Yugoslav domestic law, although Belgrade took precisely the opposite position at the time.²⁶ In reversing its position, Belgrade nowhere explains how the international law rule in this area can turn on a question of domestic law that the international community cannot knowledgeably evaluate. The second *ad hoc* exception that Serbia offers—that a parent state can make lawful an unlawful declaration by later acceptance—conflicts with its own arguments in these proceedings: that the illegality of a declaration cannot be cured by subsequent events.

20. Neither did Kosovo's declaration violate the general principle of territorial integrity. That basic principle calls upon states to respect the territorial integrity of *other states*. But it does not regulate the internal conduct of groups *within* states, or preclude such internal groups from seceding or declaring independence.²⁷ Citing Security Council resolutions, Serbia claims

²⁶ Compare Written Comments of the Government of the Republic of Serbia ("Serbia Comments"), para. 201 ("With regard to domestic law, some constitutions provide for a right to secession, as it was the case of the S.F.R.Y., only with regard to the six constituent nations"), with Stands and Conclusions of the S.F.R.Y. Presidency Concerning the Situation in Yugoslavia, 27 June 1991 (reprinted in *Yugoslavia Through Documents: From Its Creation to Its Dissolution* (Snezana Tifunovska, ed. 1994), p. 305 (describing the Slovenian and Croatian declarations as "anti-constitutional and unilateral acts lacking legality and legitimacy on the internal and external plane").

²⁷ See Georges Abi-Saab, "Conclusion", in *Secession: International Law Perspectives*, p. 474 (Marcelo Kohen, ed. 2006) ("[I]t would be erroneous to say that secession violates the principle of territorial integrity of the State, since this principle applies only in international relations, i.e. against other States that are required to respect that integrity

that the obligation to respect territorial integrity also regulates non-state actors and precludes them from declaring independence, whether peacefully or not. But none of the resolutions it cites supports that claim.²⁸ We do not deny that international law may regulate particular declarations of independence, if they are conjoined with illegal uses of force or violate other peremptory norms, such as the prohibition against apartheid. But that is hardly the case here, where those declaring independence did not violate peremptory norms. In fact, Kosovo's declaration makes such a deep commitment to respect human rights precisely because the people of Kosovo had experienced such egregious human rights abuses.

B. Resolution 1244

21. Mr. President, Kosovo's declaration of independence comports not just with general rules of international law, but also with Resolution 1244, which—as our written submissions detail—anticipated, without predetermining, that independence might be an appropriate outcome for Kosovo's future status.²⁹

22. Mr. President, Members of the Court: If you look with me at the text of Resolution 1244, you will see that it was overwhelmingly driven by the Council's overriding concern for resolving the humanitarian and human rights tragedy occurring in Kosovo. It demands that the Federal Republic of Yugoslavia “put an immediate and verifiable end to violence and repression in Kosovo” by beginning a verifiable phased withdrawal of security forces on a timetable

and not encroach on the territory of their neighbours; it does not apply within the State.”); Malcolm Shaw, “Re: Order in Council P.C. 1996-1497 of 30 September 1996,” in *Self-Determination in International Law: Quebec and Lessons Learned*, p. 136 (Anne Bayefsky, ed. 2000) (“[I]t must be recognized that international law places no analogous obligation [of respect for territorial integrity] upon individuals or groups within states. The provisions contained in the relevant international instruments bind states parties to them and not persons and peoples within states.”); *see generally* U.S. Comments, pp. 15-20.

²⁸ *See* U.S. Comments, pp. 18-20.

²⁹ *See* U.S. Statement, pp. 68-79; U.S. Comments, pp. 24-34.

synchronized with the phased insertion of an international security presence.³⁰ Paragraphs 10 and 11 authorize the establishment of an international civil presence to “[f]acilitat[e] a political process designed to determine Kosovo’s future status, *taking into account the Rambouillet accords*.”³¹

23. Serbia claims that 1244’s explicit reference to Rambouillet “clearly adopt[ed] the principle of the continued territorial integrity and sovereignty of the F.R.Y. over Kosovo.”³² But at the time, Serbia claimed just the opposite: calling the Rambouillet Accords an “unprecedented attempt to impose a solution clearly endorsing the separatists’ objectives.”³³ This is not surprising, because as you heard yesterday from Denmark, a prime objective at Rambouillet was to respect the will of the people of Kosovo. That is why, as we have seen, Rambouillet carefully avoided pre-determining any particular political outcome, on the one hand, neither favoring independence, but on the other hand, never ruling that possibility out.

24. Nor did anything in Resolution 1244’s description of the future status process give Serbia a veto over a future Kosovo declaration of independence.³⁴ To the contrary, the Rambouillet Accords, to which Resolution 1244 refers, rejected any requirement that the F.R.Y. consent to Kosovo’s future status.³⁵ In the negotiations over the Accords—and the four so-called “Hill Agreements” upon which Rambouillet was modeled—the negotiators rejected any

³⁰ See Security Council resolution 1244 (1999), S/RES/1244, para. 3 [Dossier No. 34].

³¹ *Ibid.*, paras. 10, 11.

³² Serbia Statement, para. 784; *see also* Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Advisory Opinion, Verbatim Record (“Verbatim Record”), 1 December 2009, Statement of Mr. Shaw for Serbia, para. 24.

³³ See U.S. Statement, pp. 16-17, 65.

³⁴ See U.S. Comments, pp. 32-37.

³⁵ See U.S. Statement, pp. 65-68.

requirement that the Federal Republic of Yugoslavia consent before Kosovo's future status could be finally determined.³⁶ As Professor Murphy explained last Tuesday, the first three drafts of the Hill Agreements would have required the F.R.Y.'s express agreement to change Kosovo's status at the end of the interim period. But in the fourth draft of the Hill Agreement, that language was placed in brackets, and no similar requirement for Belgrade's approval of future status appeared in the final version of either the Rambouillet Accords or Resolution 1244.

25. Some have claimed during these oral proceedings that the reference in the preamble of Resolution 1244 to the "territorial integrity" of the Federal Republic of Yugoslavia proved that the Security Council was foreclosing independence as a possible outcome. During these proceedings, one state that sat on the Security Council at the time suggested that all states understood Resolution 1244 to guarantee permanently the F.R.Y.'s "territorial integrity."³⁷ But if that were true, why did the F.R.Y. protest at the time that the resolution "opens up the possibility of the secession of Kosovo ... from Serbia and the Federal Republic of Yugoslavia"?³⁸ And why did nine of the states that were on the Council when it adopted resolution 1244 – Bahrain, Canada, France, Gambia, Malaysia, Netherlands, Slovenia, the United Kingdom and the United States – later recognize Kosovo, if they had already supposedly voted for a resolution that permanently prohibited its independence?

26. What Serbia's argument leaves out is the telling silence in Resolution 1244, the dog that did not bark. Resolution 1244 said absolutely nothing about the territorial integrity of the Federal Republic of Yugoslavia *beyond the interim period*. Unlike the previous UN Security

³⁶ See *ibid.*

³⁷ Verbatim Record, 2 December 2009, Statement of Ms. Ruiz Cerutti for Argentina, para. 12.

³⁸ Remarks of Mr. Jovanović, Chargé d'affaires of the Permanent Mission of Yugoslavia to the United Nations, in Security Council debate on adoption of resolution 1244, S/PV.4011, 10 June 1999, p. 6 [Dossier No. 33].

Council resolutions on Kosovo, Resolution 1244 qualifies its reference to territorial integrity with the phrase “as set out in Annex 2.” But Annex 2 refers to territorial integrity only in paragraph 8, which in turn describes only the political framework agreement that will cover the *interim period*. And while the text of 1244 reaffirms the commitment of the “member states”—not internal groups—to the territorial integrity of the F.R.Y., even this it does only *during the interim period*, without limiting the options for future status.³⁹

27. As important, the resolution refers not to preserving the territorial integrity of Serbia, but the territorial integrity of the *Federal Republic of Yugoslavia*, an entity that no longer exists.⁴⁰ Even though the Resolution required Kosovo to remain within the F.R.Y., it never required Kosovo to remain within “Serbia.” To the contrary, as we have explained, the resolution specifically avoided any such implication, to preserve the possibility of what were called at the time “third republic options,” under which Kosovo might end up as a third republic inside the borders of a three-republic F.R.Y., alongside Serbia and Montenegro.⁴¹

28. 1244’s reference to territorial integrity was further qualified by the Resolution’s explicit reference, in preambular paragraph 10, not just to Annex 2 (which applied only during the interim period), but also to the Helsinki Final Act. The Helsinki reference underscored the Security Council’s overriding humanitarian concern with protecting civilians, by keeping

³⁹ See U.S. Statement, pp. 68-71; U.S. Comments, pp. 25-29.

⁴⁰ No one is challenging that Serbia is the legal continuity of the F.R.Y., but the law of state succession does not mean that all references in international documents to a parent are automatically considered to apply to a continuation state. See U.S. Comments, p. 29.

⁴¹ See U.S. Statement, pp. 74-78; U.S. Comments, pp. 29-31. Our Written Comments describe Belgrade’s desire to avoid this possibility. Belgrade called such proposals “the most perfidious fraud Serbia has ever been exposed to.” U.S. Comments, pp. 30-31.

Kosovo detached from the Serbia that had so harshly oppressed them.⁴² Kosovo had famously suffered massive, systematic human rights abuses throughout the decade, which led the F.R.Y. to be suspended from participation in the OSCE. Thus, 1244's pointed reference to the Helsinki Final Act underscored that the Council was reaffirming the F.R.Y.'s territorial integrity, not as an absolute principle, but as only one of many principles (including most obviously, Helsinki human rights commitments) that needed to be considered, each principle—in the Final Act's words—being interpreted taking into account the others.”⁴³

29. Serbia and its supporters never specify precisely which words in Resolution 1244 they believe that Kosovo violated. But some suggest that Kosovo violated international law by preventing UNMIK from carrying out its mandate under Paragraph 11(e) “to facilitate a political process” designed to determine Kosovo’s future status. But that paragraph required only that the international civilian presence facilitate “a” political process—not multiple political processes.⁴⁴ By the time that Kosovo declared independence in February 2008, the specific political process envisioned by Resolution 1244 had ended. The future status process had run its course and the negotiations’ potential to produce any mutually agreed outcome on Kosovo’s status had been exhausted. With the Secretary-General’s support, the Special Envoy—who was charged with determining the scope and *duration* of the political process—had announced that “[n]o amount of additional talks, whatever the format, will overcome this impasse,” and the Envoy had specifically declared that the only viable option for Kosovo was independence.

⁴² See U.S. Statement, pp. 71-74.

⁴³ Helsinki Final Act, 1 August 1975, *available at* http://www.osce.org/documents/mcs/1975/08/4044_en.pdf.

⁴⁴ See U.S. Comments, pp. 32, 36.

30. In these proceedings, some argue that the effort by some states, including the United States, to secure a new Security Council resolution on Kosovo in July 2007⁴⁵ somehow proves that we considered a successor resolution to 1244 legally necessary for Kosovo to become independent. But like Resolution 1244, the draft 2007 resolution was entirely “status-neutral.” Its central legal purpose was to terminate UNMIK’s operations in Kosovo, as the Ahtisaari Plan had envisioned. Nothing in the draft resolution would have decided on, or even endorsed a recommendation for, Kosovo’s independence. Its non-enactment meant only that adjustments would be needed in the roles of UNMIK and other international actors envisioned in the Ahtisaari Plan. If anything, the success of that subsequent coordination only underscores the consistency of the declaration of independence with the operation of U.N. entities under Resolution 1244.

31. In short, by February 2008, the absence of any prospect of bridging the divide between Serbia and Kosovo had rendered any further negotiations pointless.⁴⁶ In these proceedings, Serbia ironically charges Kosovo with bad faith, suggesting that Kosovo’s position favoring independence in the negotiations is “in sharp contrast” with 1244’s requirement that “the sovereignty and territorial integrity of Serbia should be safeguarded.”⁴⁷ But neither UNMIK, Ahtisaari, nor the Troika ever suggested that Kosovo was negotiating in bad faith. Serbia claims that Kosovo did not need independence because Serbia had offered Kosovo the “highest degree of autonomy” under Resolution 1244.⁴⁸ But anyone who has read the factual

⁴⁵ A draft of the resolution is attached as Exhibit 36 to Serbia’s Statement.

⁴⁶ U.S. Statement, pp. 79-84.

⁴⁷ Serbia Statement, para. 919.

⁴⁸ Verbatim Record, 1 December 2009, Statement of Mr. Zimmermann for Serbia, para. 46; Serbia Statement, para. 203.

findings of the Trial Chamber in the *Milutinovic* case, who has seen photographs of Serbian tanks stationed outside the Kosovo Assembly building in March 1989, or who followed events in the Balkans during the past two decades, understands why the entire Contact Group identified Belgrade's "disastrous policies of the past [as lying] at the heart of the current problems."⁴⁹ It was Serbia, not Kosovo, that the Contact Group admonished "to demonstrate much greater flexibility" and "to begin considering reasonable and workable compromises."⁵⁰

32. Nor would it establish any violation of international law to argue that the declaration of independence was an *ultra vires* act by the Kosovo Assembly.⁵¹ For even if it were true that issuing the declaration somehow exceeded the authority conferred on the Assembly by UNMIK under the Constitutional Framework, that would only amount to a claim that it was issued by the wrong persons in Pristina. But if the declaration were considered flawed because it issued from the Provisional Institutions of Self-Government, that technicality could now easily be fixed simply by having a different constituent body within Kosovo reissue it. No one doubts that the people of Kosovo wanted independence, or that their declaration expressed their will. The people of Kosovo declared independence not under a "top-down" grant of domestic law authority from UNMIK, but rather, through a "bottom-up" expression of the will of the people of Kosovo, who left no doubt of their desire for independence.

33. Finally, even assuming for the sake of argument that the declaration did somehow violate the Constitutional Framework, that Framework, like the other regulations adopted by

⁴⁹ Statement by the Contact Group on the Future of Kosovo, London, 31 January 2006, *available at* <http://pristina.usembassy.gov/press20060131a.html>.

⁵⁰ Contact Group Ministerial Statement, Vienna, 24 July 2006, *available at* http://www.diplomatie.gouv.fr/en/IMG/pdf/statement_Vienne_24_juillet_version_finale.pdf.

⁵¹ U.S. Statement, p.57 n.231; U.S. Comments, pp. 38-39.

UNMIK, operated as domestic, not international, law.”⁵² We have previously demonstrated that UNMIK regulations must be domestic law because they operated at the domestic level, replace existing laws, and regulate local matters.⁵³ Serbia conceded the accuracy of this point, but argued that UNMIK rules somehow constitute international law because they were issued by the Security Council, an international authority.⁵⁴ But just because the Security Council authorized UNMIK to establish Kosovo’s domestic law did not automatically convert that domestic law into international law. For example, an automobile driver in Kosovo who might violate a speed limit in an UNMIK traffic regulation surely does not violate international law simply because the entity that promulgated the law against speeding was created by an international body.⁵⁵

34. Mr. President, if there were ever a time when U.N. officials could have acted to set aside the declaration of independence, it was soon after that declaration issued in February 2008. But the responsible organs of the U.N. made a considered decision nearly two years ago not to invalidate that declaration of independence. They made that decision with full awareness of that declaration’s specific acceptance of Resolution 1244 and the international presences established

⁵² UNMIK’s grant of authority was to exercise “legislative and executive powers”—that is what it was doing when it promulgated Regulation 2001/9—and its responsibility was to “change, repeal or suspend existing laws to the extent necessary for the carrying out of [its] functions. Report of the Secretary-General on the United Nations Interim Administration in Kosovo, S/1999/779, 12 July 1999 [Dossier No. 37]. A contemporaneous 2001 commentary noted that Regulation 2001/9, the Constitutional Framework, assigns to the SRSG and KFOR “the powers that are typically associated with a federal government.” A. Zimmerman and C. Stahn, *Yugoslav Territory, United Nations Trusteeship or Sovereign State*, 70 *Nordic J. Intl L.* 423, 428 (2001).

⁵³ See U.S. Comments, pp. 39-42.

⁵⁴ See Verbatim Record, 1 December 2009, Statement of Mr. Djerić for Serbia, paras. 39-41.

⁵⁵ See U.S. Comments, pp. 39-42 and citations therein.

by it, and Kosovo’s pledge to act consistently with all Security Council resolutions and requirements of international law.⁵⁶

III. The Court Should Answer Only the Narrow Question Posed

35. Finally, Mr. President, the Court should answer only the narrow question posed. What all this has demonstrated is just how anomalous and narrow is the question presented in this case. It is not a question about whether Kosovo is an independent state today, nor whether it has been properly recognized. Nor is this case about whether UNMIK and the United Nations should be doing anything differently. It is not about whether the U.N. institutions empowered to do so acted properly in declining to invalidate the declaration of independence nearly two years ago. Finally, it is not about whether Kosovo’s future status talks—which were properly ended as “exhausted” years ago—could or should now be resumed.

36. The usual premise upon which this Court’s advisory jurisdiction rests is that the requesting organ—here, the *General Assembly*—needs the Court’s legal advice to carry out its functions effectively.⁵⁷ But here the question has been asked not to give the Assembly legal advice, so much as to give advice to member states.⁵⁸ Resolution 63/3, which referred the advisory question to the Court, nowhere indicates how the Court’s opinion would relate to any planned activity of the General Assembly nor does it identify any constructive use to which the

⁵⁶ See U.S. Statement, pp. 84-89; U.S. Comments, pp. 43-45.

⁵⁷ See U.S. Statement, pp. 42-45; U.S. Comments, pp. 10-12.

⁵⁸ As this Court has emphasized in the past, advisory opinions serve to advise the organs of the *United Nations*, not individual member states. In seeking support for its Resolution, Serbia continually emphasized not the need of the General Assembly for an answer to the question, but the purported right of *member states* to refer a question to the Court. Serbia frankly described this case as being “about the right of any member state of the United Nations to pose a simple, elementary question,” asserting before the General Assembly that “[n]o country should be denied the right to refer such a matter to the ICJ”; and that a vote against the resolution “would in effect be a vote to deny the right of any country to seek—now or in the future—judicial recourse through the United Nations system.” See U.S. Statement, p. 44.

Assembly might put a Court opinion. And *unlike every prior occasion* on which the General Assembly has requested an advisory opinion, Resolution 63/3 was adopted not in connection with a substantive agenda item for the General Assembly's work, but rather, only under an *ad hoc* agenda item created for the sole purpose of requesting an advisory opinion from the Court.⁵⁹

37. Ironically, the member state who sponsored the referral of this narrow question has avowed that the Court's answer will not change even its conduct. Serbia has repeatedly said that it will not recognize Kosovo "at any cost, even in the event that the [Court's] decision is in favor of Pristina."⁶⁰ But Mr. President, this Court has no obligation to issue advisory opinions that the moving state has already suggested it might ignore, that seek to reopen long-ended political negotiations that responsible U.N. officials have concluded are futile, or that seek to enlist the Court to unravel delicate political arrangements that have brought stability to a troubled region.

38. We therefore urge this Court to leave Kosovo's declaration undisturbed—either by refraining from issuing an opinion or by simply answering in the affirmative the question presented: whether Kosovo's declaration of independence accords with international law.⁶¹ As our written pleadings make clear, the Court may answer the question posed to it and opine that international law did not prohibit Kosovo's declaration of independence, without addressing other political situations or the complex issues of self-determination raised by a number of states in these proceedings.⁶²

⁵⁹ See U.S. Comments, pp. 11-12.

⁶⁰ See *ibid.*, p. 10.

⁶¹ See U.S. Statement, pp. 45-49; U.S. Comments, p. 10.

⁶² See U.S. Comments, pp. 21-23.

39. But if the Court should find it necessary to examine Kosovo's declaration through the lens of self-determination, it should consider the unique legal and factual circumstances of this case, including the extensive Security Council attention given to Kosovo; the large-scale atrocities against the population of Kosovo that led to Rambouillet and the 1244 process; the U.N.'s concern for the will of the people of Kosovo, their undivided territory and unique historical, legal, cultural and linguistic attributes; the lengthy history of Kosovo's autonomy; the participation of Kosovo's representatives in the internationally led political process; the commitment of the people of Kosovo in their declaration to respect prior Security Council resolutions and international law; and the decision by U.N. organs to leave undisturbed Kosovo's move to independence.⁶³

40. Mr. President: In its presentation yesterday, Cyprus pointedly sought to analogize the 1244 process to the heart-wrenching, but misleading, case where a parent sends a small child off to state supervision, only to lose her forever. But upon reflection, the far better analogy would be to acknowledge the futility of the state forcing an adult child to return to an abusive home against her will, particularly where parent and child have already long lived apart, and where repeated efforts at reconciliation have reached impasse. There, as here, declaring independence would be the only viable option, and would certainly be in accordance with law.

IV. Conclusion

41. In conclusion, Mr. President, Kosovo's declaration of independence has proven to be necessary and politically stabilizing. The 2008 declaration of independence, and the ensuing recognition of Kosovo by many nations, brought much-needed stability to the Balkans and

⁶³ See *ibid.*, p. 21-23.

closed the books on the protracted break-up of what once was Yugoslavia.⁶⁴ Kosovo's declaration of independence emanated from a process supervised by the United Nations, which through Resolution 1244 and the institutions it established, was deeply involved in Kosovo's past and present. And the declaration has now made possible a future in which Kosovo is not merely independent politically, but also self-sufficient economically, administratively, and civilly.

42. Although Serbia, acting through the General Assembly, has urged this Court to issue an advisory opinion it hopes will reopen status negotiations to re-determine Kosovo's future, it has given this Court no reason to upend what has become a stable equilibrium. For Kosovo is now independent. Both Kosovo and Serbia are part of Europe's future. As the principal judicial organ of the United Nations, this Court should not be conscripted into a member state's effort to roll back the clock nearly a decade, undoing a careful process accomplished under Resolution 1244 and overseen by so many other United Nations bodies.⁶⁵ At a time when Kosovo's independence has finally closed one of the most painful chapters of modern European history, this Court should not use its advisory jurisdiction to reopen that chapter. Instead, we should all look to a common future in which both Serbia and an independent Kosovo have vitally important roles to play.

43. Mr. President, Honorable members of the Court: on behalf of my country, I thank you all for your thoughtful attention.

⁶⁴ See *ibid.*, p. 3.

⁶⁵ See *ibid.*